Supreme Court, U. S.
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No. 98-1299

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

On Petition For Writ of Certiorari to the New York State Court of Appeals

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent's opposition to certiorari in this matter serves only to highlight the need for further review.

Respondent has submitted a brief in opposition to the petition for certiorari in this matter which purports to demonstrate why further review is unwarranted but which in reality only bolsters petitioner's position that such review is appropriate and indeed necessary.

Initially, respondent's claim that the issue presented by this case is not likely to arise often is belied by the sheer number of cases he cites in erroneously contending that the issue has been resolved consistently throughout the nation. Indeed, his claim that all of the states (save for one) and all federal circuits have uniformly applied the same standard for waiver under the IAD is undermined by the very authority he cites and in any event such claim does not address the precise issue here - whether, regardless of the terms in which the test for waiver is described, a defendant's express agreement to a proposed trial date constitutes waiver. At least four of the federal cases cited - United States v Johnson (713 F2d 633 [11th Cir 1983], cert denied sub nom. Watkins v United States, 465 US 1081 [1984]), Camp v United States (587 F2d 397 [8th Cir 1978]), United States v Palmer (574 F2d 164 [3rd Cir 1978], cert denied 437 US 907 [1978]) and United States v Scallion (548 F2d 1168 [5th Cir 1977], cert denied 436 US 943 [1978]) - do not address waiver in the context at issue here (instead dealing with when a defendant generally waives an IAD claim by failing to assert it in the trial court and/or appellate

court), and another case - United States v Rossetti (768 F2d 12 [1st Cir 1985]) - expressly suggests a potential conflict regarding the standard for determining waiver and apparently adopts a test rejected by other courts (id., at 19 n8; cf., e.g., Webb v Keohane, 804 F2d 413, 414-415 [7th Cir 1986]; United States v Odom, 674 F2d 228, 230 [4th Cir 1982], cert denied 457 US 1125 [1982] [cases also cited by respondent]).

Furthermore, respondent's contention that delays are chargeable to the defense, i.e., a waiver of IAD speedy trial rights occurs, only where such delays "benefit" the defense is a mischaracterization of the test(s) for waiver actually described in the case law (no court holds that such is a necessary component of the waiver standard). In any event, his implicit suggestion that the required benefit was absent here is wholly unsupported; there was nothing on the record at the time the trial date was discussed among the court and the parties indicating that respondent wanted an earlier date and/or that the time period between then and the agreed-upon date did not inure to respondent's benefit (by, e.g., at a minimum giving him more time to prepare for trial).

Respondent claims that the state courts which have addressed the matter have uniformly adopted the "same standard" as the federal courts, but the cases cited in support of this proposition again for the most part do not address the precise waiver issue presented here or else directly support petitioner's position and contradict the determination of the New York Court of Appeals herein (e.g., State v Schmidt, 84 Hawaii 191, 198-200, 932 P2d 328, 335-337 [Hawaii Ct App 1997]; People v Jones, 197 Mich App 76, 495 NW2d 159 [Mich Ct App 1992] [a case expressly relied upon by the trial court herein in the ruling that was eventually reversed by the Court of Appeals]). Respondent's claim that Indiana stands alone on the issue presented here is patently false as demonstrated by the above-cited cases and those cited in the petition for certiorari; other state courts (lower appellate courts

in the absence of high courts' discussion of the issue) have also adopted the position urged by petitioner (e.g., State v Harris, 49 Conn App 121, 141, 714 A2d 12, 21 [Conn App 1998]; State v Aukes, 192 Wis2d 338, 345, 531 NW2d 382, 385 [Wis Ct App 1995]).

In addition, respondent's contention that the question presented by the petition (i.e., as "framed") was not actually addressed by the court below is specious. Respondent's argument in this regard actually begs the question clearly presented: does a defendant's verbal assent to a proposed trial date constitute waiver regardless of how one "labels" or characterizes such assent. In any event, respondent's suggestion that there is some critical, definable difference between "agreement", "concurrence" and "acquiescence" in this regard would no doubt come as a surprise to anyone with a basic comprehension of the English language, not to mention publishers of dictionaries and thesauruses.

Finally, respondent's suggestion that his counsel's agreement to the trial date was motivated by concerns of "civility" and "politeness" (i.e., that the court "forced" the trial date on counsel, who dared not object lest he incur the court's wrath) is farcical; the reason for such agreement is irrelevant and in any event this claim is flatly refuted by the record and indeed false as a general proposition as it does not comport with the reality of criminal law practice in this community (and presumably elsewhere).

Thus defendant's arguments purporting to dispel or diminish the worthiness of this case for further review actually serve the opposite purpose and merely underscore that the issue presented herein is significant, recurring and the subject of sharp -

indeed irreconcilable-conflict among the various jurisdictions of this nation. We thus continue to urge that review be granted.

Respectfully submitted,

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